



STATE OF WASHINGTON

PUBLIC DISCLOSURE COMMISSION

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TO: Members, Public Disclosure Commission

FROM: Doug Ellis
Director of Public Outreach

DATE: September 25, 2002

SUBJECT: Petition for Rulemaking –
Request for Repeal of WAC 390-16-050 and 390-16-055
Consideration at October 2, 2002 Commission Meeting

On August 6, 2002 the Public Disclosure Commission staff received a petition regarding two administrative rules. The petitioner asks the Commission to repeal the rules referenced above. Consideration of this petition is scheduled for the October 2 Commission meeting. A copy of the petition is attached to this memorandum. Under the state Administrative Procedure Act, the Commission shall either deny the petition in writing, stating reasons, or initiate rulemaking proceedings. Staff recommends that the Commission deny the petition.

Petition

The subject of the petition involves forfeiture provisions of RCW 42.17.090(1)(l), and the Commission's rules adopted to implement that statute. The petitioner is Richard Pope, an attorney who believes that a contribution he received as a candidate in 2000 would subject him to the forfeiture provisions in the statute and rules.

The petitioner maintains that **WAC 390-16-050** and **WAC 390-16-055** should be repealed because the rules are contrary to the statutory provisions of Chapter 42.17 RCW and are unconstitutional.

Statute

The rules are designed to facilitate the implementation of RCW 42.17.090(1)(l). Which reads as follows:

Funds received from a political committee not otherwise required to report under this chapter (a "nonreporting committee"). Such funds shall be forfeited to the state of Washington unless the nonreporting committee has filed or within ten days following such receipt files with the commission a statement disclosing: (i) Its name and address; (ii) the purposes of the nonreporting committee; (iii) the names, addresses, and titles of its officers or if it has no officers, the names, addresses, and titles of its responsible leaders; (iv) the name, office sought, and party affiliation of each candidate in the state of Washington whom the nonreporting committee is supporting, and, if such committee is supporting the entire ticket of any party, the name of the party; (v) the ballot proposition supported or opposed in the state of Washington, if any, and whether such committee is in favor of or opposed to such proposition; (vi) the name and address of each person residing in the state of Washington or corporation which has a place of business in the state of Washington who has made one or more contributions in the aggregate of more than twenty-five dollars to the nonreporting committee during the current calendar year, together with the money value and date of such contributions; (vii) the name and address of each person in the state of Washington to whom an expenditure was made by the nonreporting committee on behalf of a candidate or political committee in the aggregate amount of more than fifty dollars, the amount, date, and purpose of such expenditure, and the total sum of such expenditures; (viii) such other information as the commission may prescribe by rule, in keeping with the policies and purposes of this chapter. A nonreporting committee incurring an obligation to file additional reports in a calendar year may satisfy the obligation by filing with the commission a letter providing updating or amending information.

Rules

The implementing rules state:

WAC 390-16-050 Forms for contributions and expenditures of out-of-state or federal political committees. *The official form for the report of contributions and expenditures of political committees (a) registered with the Federal Election Commission, (b) not domiciled in Washington state, or (c) otherwise not required to report under RCW 42.17.040, 42.17.065, or 42.17.080 is designated "C-5," revised 6/02. Copies of this form are available at the Commission Office, Room 206, Evergreen Plaza Building, Olympia, Washington 98504-0908. Any paper attachments shall be on 8 1/2" x 11" white paper.*

WAC 390-16-055 Forfeiture of contributions received from out-of-state or federal political committees. *Each candidate or political committee receiving funds from a nonreporting committee (out-of-state or federal political committee) as described in RCW 42.17.090(1)(l) shall determine whether such committee has complied with that subsection. If the nonreporting committee has not filed the required report under WAC 390-16-050, the funds shall not be forfeited or reportable as having been received if they are returned to the nonreporting committee within five business days after receipt. If an out-of-state or federal political committee fails to file a complete and timely report, the recipient shall forfeit the contribution to the state of Washington.*

State Administrative Procedure Act Requirements

Under the Administrative Procedure Act (RCW 34.05.330), the Commission shall, within sixty days after submission of a petition, either (1) deny the petition (stating the reasons in writing, specifically addressing the concerns of the petitioner, and where appropriate, addressing the alternative means by which it will address the concerns raised by the petitioner) or, (2) initiate rule-making proceedings.

A Pending Enforcement Case; Alternative Means for Addressing Petition

A parallel means for addressing the petitioner's concerns is available before the Commission through alternative means which may resolve the issues at question, but at minimum, addresses the same subjects of the petition. That parallel means arises out of an enforcement case, involving application of the same rules, similar issues as those raised in the petition, and the same petitioner.

On August 7, 2002, one day after the petition for rulemaking was received, the petitioner asked the Office of the Attorney General to commence action against the Washington State Democratic Central Committee under the citizens action provisions of RCW 42.17.400(4) for alleged violations of RCW 42.17.090(1)(l) as well as WACs 390-16-050 and 390-16-055 (the same rules that are the subject of the petitioner's rulemaking petition).¹

¹ The Executive Director contacted the petitioner by letter to (1) determine if he wished the Commission to proceed with his rulemaking petition, when he had also submitted a "45 day letter" under RCW 42.17.400(4), raising the same arguments as in the petition, and (2) confirming that he was asking for contrary relief in those two requests for action. That is, in the rulemaking petition, the petitioner seeks repeal of the rules; in the 45-day letter, he seeks application of the rules. By letter dated August 17, 2002, it appears the petitioner wishes the Commission to proceed in considering the rulemaking petition.

Because of these dual requests (the petition for rulemaking and the pending enforcement matter), staff believes that:

- (1) it would not be appropriate to initiate rulemaking to repeal the same rules that are the subject of an ongoing enforcement matter (much like the Commission does not issue declaratory orders during an enforcement case when the order would address the statute or rule at issue in the case), and
- (2) an alternative means of addressing the legal concerns raised by the petitioner may be satisfied during the enforcement hearing process and any subsequent litigation that may arise from that action. It is unnecessary to initiate rulemaking when a parallel process may resolve the petitioner's concerns.

Petitioner's Arguments Summarized, and Staff Response

While staff believes that rulemaking should not be initiated at this time due to the other pending enforcement matter on the same subject, staff will nonetheless respond briefly to the issues raised by the petitioner in requesting repeal of the rules.

In attempting to ascertain the petitioner's arguments for the repeal of WAC 390-16-050 and WAC 390-16-055 staff found what appear to be eight points that may be considered relevant to the question of whether to initiate rulemaking to repeal the rules. Staff believes that these arguments by the petitioner do not require the Commission to repeal the rules. It should be noted that a number of the issues raised by the petitioner may be beyond the jurisdiction of the Commission.

1. *Argument: WAC 390-16-050 and WAC 390-16-055 are contrary to the statutory provisions of Chapter 42.17 RCW. (Page 1, line 26, Petition for Repeal of Agency Rules)*

Staff response: The rules explain and interpret the statute. The Legislature has not acted, through a change in law, to reject the Commission's interpretation of the statute via these rules, even though the statute has been amended five times over the years. See history of statute, attached. WACs 390-16-050 and 390-16-055 have been amended or revised at least six times since 1973 and on each occasion, the rule amendments went through the stakeholder, state register and open public meeting process. The issues of alleged lack of regulatory authority, unconstitutionality or lack of clarity have not been raised either through public comment or subsequent legislative action.

In addition, at no time has the Legislative Joint Administrative Rules Review Committee or the courts acted to suspend or nullify either rule under consideration. The Commission's interpretation is also consistent with a formal Attorney General's Opinion from 1993 (AGO 1993 No. 3).²

In sum, there has been significant opportunity through a variety of public processes to correct the Commission's interpretation of the statute, if the Commission's interpretation through its rules was thought to be in error.

2. *Argument: There is no definition of "nonreporting committee" contained in Chapter 42.17 RCW other than the definition contained in RCW 42.17.090(1)(l). (Page 3, line 6, Petition for Repeal of Agency Rules)*

Staff response: The statute does define "nonreporting committee" as a political committee not otherwise required to report under Chapter 42.17 RCW. The Commission has further clarified at WAC 390-16-055 what is a "nonreporting committee" as a committee (a) registered with the Federal Election Commission, (b) not domiciled in Washington state, or (c) otherwise not required to report under RCW 42.17.040, 42.17.065, or 42.17.080. The courts have confirmed that it is within the Commission's statutory authority to interpret and implement through rules those sections of RCW 42.17 that it enforces. RCW 42.17.370; State ex rel. Evergreen Freedom Foundation v. Washington Education Association, 140 Wn.2d 615 (2000).

3. *Argument: Political committees as defined in RCW 42.17.020(33) should include all nonreporting committees (out-of-state or federal political committees) since there is no such thing as a nonreporting committee. All committees domiciled outside the state of Washington, other than those entirely within the exceptions of RCW 42.17.030, should be required to report under RCW 42.17.040, 42,17,080 and 42.17.090. (Page 3, line 13, Petition for Repeal of Agency Rules)*

Staff Response: AGO 1993 No. 3 states that Washington must have jurisdiction over a political committee in order to impose its campaign reporting requirements and to have jurisdictional authority over committees domiciled outside the state of Washington, there must be purposeful minimum contacts between the committee and Washington state. If Washington does not have jurisdiction over an out-of-state political committee as set forth in AGO 1993 No. 3, the committee would not be required to file reports with the state. However, if this nonreporting committee subsequently makes contributions to candidates or ballot measures in Washington, the statutory

² While the petitioner disagrees with much of the analysis of AGO 1993 No. 3 (see Petition, pages 10 – 17) the formal opinion is analysis that has proven consistent with the Commission's interpretation, and has not been rejected by the Legislature in subsequent amendments to RCW 42.17.090(1)(l).

provisions apply and the committee must file reports pursuant to RCW 42.17.090(1)(l).

4. *Argument: RCW 42.17.090(1)(l) is a punitive statute. (Page 17, line 14, Petition for Repeal of Agency Rules)*

Staff response: The statutory language of RCW 42.17.090(1)(l) is plain: “Such funds shall be forfeited to the state of Washington unless the nonreporting committee has filed or within ten days following such receipt files with the commission....” The issue of whether such a statute is unlawfully “punitive” is a matter more appropriate for consideration by the courts. Constitutional claims are resolved by the courts, not by administrative agencies.

5. *Argument: The PDC lacks any authority to adopt regulations because the statute is unconstitutionally vague regarding “political committee” as read in conjunction with “nonreporting committee”. (Page 19, line 1, Petition for Repeal of Agency Rules)*

Staff Response: The statutory language of RCW 42.17.090(1)(l) is plain: “Such funds shall be forfeited to the state of Washington unless the nonreporting committee has filed or within ten days following such receipt files with the commission....” RCW 42.17.370 empowers the Commission to “adopt, promulgate, amend, and rescind suitable administrative rules to carry out the policies and purposes of this chapter...” If the Legislature had found the statute to be vague, it could have amended the statute on the subjects the petitioner claims are vague. With respect to whether the alleged vagueness violates the constitution, that issue is a matter more appropriate for consideration by the courts. Constitutional claims are resolved by the courts, not by administrative agencies.

6. *Argument: The regulations adopted by the PDC in WAC 390-16-050 and WAC 390-16-055 do not provide any clear guidance nor do they adhere to the statutory language. (Page 19, line 2, Petition for Repeal of Agency Rules)*

Staff Response: WAC 390-16-050 and WAC 390-16-055 have been in place since 1974. Out-of-state and federal political committees have filed the appropriate reports on the PDC C-5 form since adoption of the rules by the Commission. These rules have been subject to stakeholder meetings and open public hearings and neither the political committees subject to the rules nor the Legislature have indicated that the rules were not clear or that they did not adhere to the statutory language.

7. *Argument: WAC 390-16-050 and WAC 390-16-055 are unconstitutional because to require forfeiture of contributions would fail the constitutional test of equal protection. (Page 23, line 20, Petition for Repeal of Agency Rules)*

Staff Response: An analysis of out-of-state nonreporting political committees as they differ from in-state political committees because of limitations on the state's jurisdiction is provided in AGO 1993 No. 3. The analysis, coupled with the Commission's rules and the lack of legislative action that would compel a different approach to these committees, reflect a long-standing and workable implementation of the statute. Issues of the constitutionality of a state statute or the subsequent interpretative rules are under the jurisdiction of the judicial branch and are matters that the courts resolve.

8. *Argument: WAC 390-16-050 violates RCW 42.17.370(10) since it grants a reporting modification to political committees domiciled outside of the state or registered with the FEC. (Page 25, line 22, Petition for Repeal of Agency Rules)*

Staff Response: Interpretation and implementation of a statute that provides jurisdictional authority over "nonreporting committees" (out-of-state or federal political committees) only when such a committee contributes to candidates or ballot proposition in Washington state cannot be considered an action taken by the Commission to provide a blanket "modification" under RCW 42.17.370(10). Again, under the analysis reflected in AGO 1993 No. 3, the state must have jurisdiction over a political committee in order to impose its campaign reporting requirements or grant reporting modifications in chapter 42.17 RCW.

Conclusion

The rules sought to be repealed are (1) the subject of a pending enforcement action filed by the same petitioner, who seeks application of the same rules sought to be repealed here, and (2) appropriate because they clarify and implement the provisions of RCW 42.17.090(1)(i). Staff requests the Commission to deny the petition for rulemaking.

It should also be noted that if the Commission denies the petition, the petitioner under RCW 34.05.330, has the right to appeal the Commission's denial of the request to initiate rulemaking to the Joint Administrative Rules Review Committee, to the Office of the Governor; or he may seek review of the rules by the Superior Court under RCW 34.05.570.

Enclosures